

THE INAUGURAL ROBERT A. KINDLER
PROFESSORSHIP OF LAW LECTURE: WHEN IS
INTERNATIONAL LAW USEFUL?

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INTRODUCTION

The subject of this article—“When is International Law Useful?”—might seem odd coming from an academic who has spent much of his career thinking and writing about various aspects of international law. Surely such a person must believe that international law is useful unless he is prepared to concede that he has been wasting his career. Not surprisingly, therefore, I will make the argument that international law is often useful, but I have not always subscribed to that view.

While in law school, I faced a bewildering array of possible elective classes, and it was impossible to take all the classes that sounded interesting. Although the choices available to me at that time included a handful of courses in international law, I chose not to take any of them. The reason was simple. In conversation with my classmates, I came to the view that international law, although well-intentioned and addressed to many

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important subjects, was largely pointless. I knew only a little about it, but what I knew tended to support this view.

For example, I was aware that the United Nations Charter prohibits war except when authorized by the Security Council or in self-defense in the face of an actual or imminent attack.¹ Looking around the world at the beginning of the 1980s, it seemed to me that belligerent governments paid no attention to this body of law beyond a little lip service on opportunistic occasions. The Security Council likewise seemed mostly useless, polarized as it was by the conflict between the West and the communist nations of the time, each side holding veto power.²

I also knew a little bit about international human rights law. I had heard of the Universal Declaration of Human Rights, created in post-war 1948 and championed by Eleanor Roosevelt. Negotiations following the Universal Declaration led to the International Covenant on Economic, Social and Cultural Rights (ICESCR) (focused on positive rights such as the right to education) and the International Covenant on Civil and Political Rights (ICCPR) (focused on negative rights such as the right to be free of torture and arbitrary detention). Both were adopted by the UN General Assembly in 1966, but it was hard to see how they had much impact.³ It seemed to me that governments continued to behave more or less as they had before, with liberal regimes respecting many so-called human rights and repressive regimes regularly ignoring them.

In short, what little I knew about international law led me to the conclusion that it was of minimal value, if any. I even had a theory of why that should be so, a theory that many of my colleagues seemed to share.

The theory begins with the correct observation that some law reflects values and principles that we hold independently

1. See ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* 174–75 (2013) [hereinafter POSNER & SYKES, FOUNDATIONS].

2. See generally Eric A. Poser & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L.J. 993, 1012–13 (2005) (describing the unwillingness of states with veto power to give up their private interests for the sake of collective security efforts).

3. See POSNER & SYKES, FOUNDATIONS, *supra* note 1, at 201–08 (arguing that unlike many treaties that act as tools for cooperation, human rights treaties serve as an aspirational reflection of good government practices).

and would not violate regardless of the law. I cannot imagine myself committing what the law defines as rape or first-degree murder, for example, even if it were not illegal. Likewise, certain requirements of international law—such as the requirement that governments outlaw slavery⁴—will be respected by most nations by virtue of deeply held domestic values regardless of what international law says. Governments on the whole tend to behave in line with the prevailing views of the citizenry, although exceptions arise, to be sure. These observations suggest that we will observe a considerable degree of “compliance” with international law for reasons that have nothing to do with international law itself; nations respect many important norms for purely internal reasons. In such instances, international law *per se* does not matter.

Of course, there are many occasions where laws require something from us that we might not do anyway. Perhaps I would be inclined to drive 45 miles an hour in a 25 m.p.h. zone were it not illegal. If I am then coaxed toward 25 m.p.h. nevertheless, it is because I fear a speeding ticket and the attendant penalties or perhaps tort liability if I have an accident.

On the surface, however, if law is to be effective in inducing behavior that would not occur anyway, it seems to require an enforcer. If there were no police to issue a speeding ticket (and no prospect of some other penalty for speeding, such as a tort judgment against me if I have an accident), I would not worry about speeding and would drive as fast as I pleased, taking account only of the risks to myself and whatever sense of personal moral responsibility I might hold toward those who I endanger.

Herein lies the basis for my once-held belief that international law ultimately does not matter: When international law asks nations to behave in ways that they would not otherwise, it will fail because it lacks the sort of enforcement mechanism that gives much of domestic law its bite. If a nation violates international law, there is no world government to sanction it, no sheriff to lock up the wrongdoer, no court to order the seizure and forfeiture of assets, no international entity in a position to compel the payment of damages, and so on. The few enforcers that do exist are exceedingly weak. The Security

4. International Covenant on Civil and Political Rights art. 8, Dec. 19, 1966, 999 U.N.T.S. 175.

Council, as already noted, rarely acts and in any case will respond only to the most serious misbehaviors. The International Court of Justice cannot force nations to appear before it, and can do little other than wag its finger at nations that do not respect its judgments.⁵

Accordingly, my view was that international law does not affect behavior. States obey it to a significant degree because it often requires what they are inclined to do anyway; in other situations, states will simply ignore international law because it lacks an effective enforcer.⁶

I. AN EVOLVING VIEW

I do not subscribe to this view any longer, at least not with respect to many areas of international law. What changed? I stumbled into real contact with international law when I took a job as an associate at Arnold & Porter in Washington and was asked to assist on some international trade matters. The cases to which I was assigned were mainly governed by domestic law—antidumping cases, countervailing duty cases, and the like—but I quickly learned that domestic law and international law were strikingly similar. I learned that U.S. international trade statutes had been amended on a variety of occasions to conform with obligations negotiated under the auspices of the General Agreement on Tariffs and Trade (GATT), a multilateral treaty first negotiated in 1947.⁷ I learned that tariffs on imported goods had been steadily negotiated downward under GATT since that time, and that the United States had faithfully implemented the negotiated tariff reductions.

5. See POSNER & SYKES, FOUNDATIONS, *supra* note 1, at 101–03 (explaining the limitations of the ICJ).

6. This theme also runs through JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005). Goldsmith and Posner posit, as do I, that nations will tend to pursue their rational self-interest as assessed by governing officials. *Id.* at 3. Those officials will yield to international law in the face of contrary preferences only if compliance with international law brings them sufficient benefits or non-compliance imposes on them sufficient costs. *Id.* at 100.

7. Classic treatises on the early history of GATT include JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969) and KENNETH DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1977) (1970).

Other nations had done the same.⁸ I learned that members of GATT could complain about alleged violations by other members and could secure the formation of an arbitration panel to hear the case. Often, but not always, a member that lost in arbitration and was found to be in violation of GATT would bring its behavior into compliance with the ruling.⁹ Thus, the system appeared to be one in which there were some disputes and some non-compliance, but the overwhelming majority of obligations were respected.¹⁰ Since then, the GATT system has been incorporated into the World Trade Organization,¹¹ but the picture is much the same.

My exposure to the GATT system posed a problem for my theory about the ineffectiveness of international law. If a GATT member violated its commitments, no sheriff would lock up its customs officials, no court could order it to pay damages, and no army would attack it. To be sure, a GATT arbitration panel might rule that a violation was present, but the arbitration panel had no authority to impose any form of sanction. The GATT membership as a whole, in principle, might authorize sanctions, but the voting rule in GATT evolved early on into a requirement of unanimity, with the result that a violator could block any authority for sanctions. Consequently, formal sanctions played no role in the system. The coercive enforcement mechanisms that we see in domestic law were simply absent in GATT.¹²

Yet, GATT members complied with literally tens of thousands of obligations, including the negotiated tariff ceilings on the majority of goods imported into most major trad-

8. For data on average tariff rates in major developed nations following various rounds of GATT negotiations, see JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., *INTERNATIONAL ECONOMIC RELATIONS*, chapter 1.3 (6th ed. 2013).

9. The classic study of GATT dispute resolution is ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d. ed. 1990).

10. *See id.* at 204–05 (noting the degree of cooperation necessary for the operation of GATT litigation procedures and the legitimacy and force created by the normative authority of GATT legal rulings).

11. The Marrakesh Treaty establishing the WTO was concluded in 1994 and incorporated the GATT system into the WTO. Marrakesh Agreement Establishing the World Trade Organization art. 2, Apr. 15, 1994, 1867 U.N.T.S. 154.

12. *See HUDEC, supra* notes 9–10 and accompanying text (noting GATT compliance despite the absence of coercive enforcement mechanisms).

ing nations.¹³ Likewise, there seemed to be little doubt that GATT had changed behavior and induced members to behave in ways that they would not have otherwise.¹⁴ For me the timeline offered the proof: A round of GATT negotiations would be conducted, commitments would be made at the end of the round, and then domestic laws would be changed to implement those commitments.

II. SELF-ENFORCING INTERNATIONAL LAW

How can such a system of law, with no central enforcer and no formal sanctions for violations, possibly succeed? This question is an important one with respect to many areas of human interaction, not just international law. Scholars in various disciplines have given such questions a lot of thought over the past few decades.¹⁵

Many economists, too numerous to mention, have made advances in the theory of repeated games, which refers to any type of strategic interaction among individuals or institutions

13. See, e.g., JOHN H. BARTON, JUDITH L. GOLDSTEIN, TIMOTHY E. JOSLING, & RICHARD H. STEINBERG, *THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO* 213 (2006) (indicating that the GATT/WTO has been successful in maintaining trade openness, ensuring that trade agreements are honored, and creating worldwide normative and legal standards).

14. A contrarian assessment of GATT, suggesting that GATT had little effect on the behavior of its members, was put forward in Andrew K. Rose, *Do We Really Know that the WTO Increases Trade?*, 94 *AM. ECON. REV.* 98, 112 (2004). Rose deployed a gravity model and claims that GATT has not increased trade relative to what would be expected from geographic proximity alone. A strong critique of Rose's study, based on issues relating to his coding of GATT membership, is found in Michael Tomz, Judith L. Goldstein & Douglas Rivers, *Do We Really Know That the WTO Increases Trade?: Comment*, 97 *AM. ECON. REV.* 2005, 2016 (2007).

15. In addition to the economically-oriented scholars discussed below, many political scientists have addressed the mechanisms for decentralized enforcement of international law. See, e.g., ROBERT KEOHANE, *POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD* 13 (2002) (discussing how states and other international actors apply their political influence to create the consistency and a broader sense of belief and expectation necessary for the maintenance of institutions); *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983) (containing a variety of essays that explore the role that exogenous variables—such as self-interest and political power—play in the development of regimes).

that repeats itself over time.¹⁶ An example that resonates well with a legal audience is any long-term contract. Each party to the contract promises to perform in some way at specified points in time. Perhaps one party promises to deliver a load of goods at regular intervals, for example, while the other party promises to pay for them. If both parties respect their commitments, presumably both of them will be better off or else they would not have entered the contract. But it is easy to see how each party would be better off yet if the *other* party performed and the performance owed in return could be avoided. A buyer of goods would love to have the goods delivered and not have to pay for them, for example. But if parties to contracts expect the other party to renege in this fashion, contracts will not be viable and the mutual gains from contracting will be lost.

The familiar solution to lawyers is to imbed the contract within a legal regime with a central enforcer who can coerce parties to live up to their commitments. A party who breaches a domestic contract can be sued for damages or perhaps specific performance, and if the plaintiff prevails, the court will use its coercive powers to enforce the judgment. But what happens with long-term exchange if a central enforcer is not available, or becomes too expensive to utilize?

This is where the theory of repeated games comes into play. It studies repeated interactions in which the parties can benefit from some form of cooperation (one party delivers goods, the other party pays, for example), but there is no central authority to penalize a party who deviates from cooperation. One of the most interesting results in this body of research is known as the Folk Theorem, so named because so many different folks came upon much the same insights at about the same time.¹⁷ I will not offer a formal statement of the theorem, but will simply note a key implication: Under cer-

16. Classic references include DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* (1991) (serving as a text for both beginner and advanced courses in game theory, particularly its applications to economic problems); ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* (1992) (introducing game theory and emphasizing economic applications); MARTIN J. OSBORNE & ARIEL RUBINSTEIN, *A COURSE IN GAME THEORY* (1994) (presenting the main ideas of game theory, emphasizing foundations and core concepts).

17. See, e.g., GIBBONS, *supra* note 16, at 89 n.16; ERIC RASMUSEN, *GAMES AND INFORMATION* 131 (4th ed. 2007).

tain conditions, it is possible (though by no means guaranteed) for parties to a strategic interaction to sustain cooperative behavior without a central enforcer simply through mutual threats to punish defection from cooperation by withholding cooperation in response.¹⁸ In other words, if you cheat on your commitments, I'll cheat on mine, and we'll both be worse off as a consequence. University of Chicago economist Lester Telser famously termed cooperative agreements that work in this fashion as "self-enforcing agreements."¹⁹

Some required conditions for cooperation to be possible in this fashion are, first, that actors not place too much value on the present relative to the future. If they do, the returns to defection from cooperation today may exceed the costs of punishment down the road. Another condition is that the strategic interaction must go on indefinitely or at least have no predictable endpoint. If interaction has a known endpoint, actors will tend to defect from cooperation in the last period because there is no punishment possible in future periods. Knowing that, they will defect in the next to last period, and then in the next to next to last period, and so on—cooperation unravels.²⁰

The notion that cooperation can emerge and sustain itself in a wide range of settings without the need for a formal legal system also found its way into legal scholarship under the rubric of "order without law." Scholars such as Robert Ellickson²¹ and Lisa Bernstein²² developed well-known case studies of commercial settings in which cooperation seemed to evolve

18. RASMUSEN, *supra* note 17.

19. L. G. Telser, *A Theory of Self-Enforcing Agreements*, 53 J. BUS. 27, 27 (1980).

20. See RASMUSEN, *supra* note 17, at 129 (describing the finite repeated Prisoner's Dilemma, a scenario in which there are a finite number of periods and each player knows that the other will confess in the final repetition, so both confess in every period).

21. See ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1 (1994) (describing how rural Shasta County, CA cattle ranchers settle disputes through informal norms rather than legal rules).

22. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 132–35, 138–43 (1992) (analyzing the role of informal agreements and reputational bonds within the diamond industry); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745–54, 1761–62 (2001) (explaining the function of

and sustain itself through informal norms rather than legal institutions. They found examples of successful cooperation on this basis in a range of industries, such as ranching in Shasta County, CA, the cotton industry, and the diamond industry.²³

Although these insights about the evolution of cooperation in the absence of a central enforcer or formal legal system were developed without any focus on international law, we can draw on them to begin to understand when international law can work well to sustain international cooperation. To an increasing degree, scholars with an interest in international law are doing exactly that, with the most thoroughly developed work arising in the area of international trade. Accordingly, in a moment we will turn back to the WTO/GATT system that I described earlier, and see if we can move beyond my old theory of why it should not work due to the absence of a central enforcer. In so doing, we will follow an algorithm of sorts for thinking about the ability of international law to orchestrate cooperation in general, an approach that will suggest when international law can work well and when it will tend to be ineffective.

III. ELEMENTS OF SUCCESSFUL SELF-ENFORCEMENT

At the outset, it will be helpful to outline the steps in this algorithm.²⁴ The first step is to identify the source of the gains from international cooperation—put simply, what is the problem that international cooperation, and thus international law, needs to solve? For the most part, although not exclusively (I return to this caveat below), the gains from international cooperation arise because of what economists term “externality” problems. The economic concept of an externality is really quite simple: when individuals or institutions take actions, those actions may impose costs or benefits on others that the actor does not take into account.²⁵ The classic example is pol-

commercial social norms in the cotton industry’s extra-legal regulatory and dispute settlement system).

23. See *supra* notes 21–22 (observing social norms playing the role of legal institutions in various communities and industries).

24. This general approach to thinking about international law is deployed in POSNER & SYKES, *supra* note 1, at 17.

25. See, e.g., HAL R. VARIAN, MICROECONOMIC ANALYSIS 432 (3d ed. 1992) (discussing consumption and production externalities).

lution. Firms with production processes that emit pollutants will tend to ignore the harm that pollution does to others in society, and then engage in an excessive level of production and pollution from a societal standpoint.

The actions taken by national governments create a variety of externalities as well. To continue with the example of pollution, some pollution crosses borders or damages elements of the global commons, such as the climate. The decision by national governments to regulate or not to regulate domestic pollution, or their decision about how much to regulate it, then affects the well-being of people in other nations. Yet, it is often reasonable to suppose that national governments focus mainly or even exclusively on the well-being of their own citizens (some do not even do that very well), and that national governments do not take the well-being of foreigners into account in formulating their policies. The gains from international cooperation, and associated aspects of international law, will then arise in large part from cooperative measures that induce governments to follow policies that promote the broader global interest rather than just their parochial, national interests. Accordingly, in seeking to identify the gains from international cooperation, the initial inquiry in most cases is to ask what sorts of international externalities arise when national governments act without international cooperation.

The second step in the algorithm is to ask whether and how the gains from international cooperation can be distributed so that each cooperating state will benefit.²⁶ Absent coercion, states will not agree to cooperate, or accede to international legal rules, unless they perceive themselves better off than by declining to cooperate and sticking with their best unilateral options. Thus, if international law is to succeed at orchestrating cooperation, it must divide the gains in a way that meets this requirement.

An important consideration in this regard is whether the externality problem that cooperation seeks to address is *recipro-*

26. I speak of the "state" as if it were a unitary actor. Of course, a state is an agglomeration of individual actors operating through some form of political process. To say that the "state" is better off by participating in the international legal regime is really shorthand for saying that the political process yields an outcome that prefers participation to non-participation.

cal. Again sticking with the pollution example, imagine two adjacent states, A and B, that each contain polluters and that regulate pollution to some degree. Assume that neither cares directly about the well-being of citizens in the adjacent state. To the degree that pollution crosses the border, it will then tend to be under-regulated. Imagine, then, that someone proposes a pact between the two states requiring each to regulate pollution more stringently. Is such a pact viable?

If the pollution runs in only one direction, say, from A to B, then state A gains nothing from the pact. B may offer such an agreement, but A will reject it. If pollution runs in both directions, however, the possibility arises that a mutual pact to reduce pollution would benefit both states.

Consequently, cooperation tends to be easier in the face of reciprocal externalities. A simple agreement requiring each state to adjust its policies on the same subject matter may then achieve what is necessary. If externalities are non-reciprocal or highly asymmetric, however, such agreements may not entice the participation of all states whose cooperation is important. That does not mean that cooperation is impossible, but it will then require what we might call “issue linkage.”²⁷ Perhaps state A will agree to regulate pollution more stringently if state B agrees to strengthen its intellectual property laws, for example. Such arrangements are certainly not unfamiliar in international law, but they tend to be more difficult to negotiate and sustain because more actors and interest groups become involved, raising the costs of negotiation and opening up more opportunities for coalitions to block progress.²⁸

The third and final step in the algorithm pertains to enforcement. Once we have identified the gains from cooperation and a strategy for distributing them so that all participating states benefit, the question arises whether the arrangement is sustainable, or whether instead it will unravel due to defections and cheating. In the absence of any central en-

27. See POSNER & SYKES, *supra* note 1, at 22 (exploring the improved likelihood of state participation in international agreements when otherwise unrelated agreements are included in the bargaining terms).

28. The WTO contains examples of successful issue linkage. The TRIPS Agreement on intellectual property, for example, was pushed by developed countries. Developing countries acceded in part because of trade concessions in other areas, such as access to the textile markets of developed countries. See JACKSON, DAVEY & SYKES, *supra* note 8, at 1113–24.

forcer to compel states to obey their commitments, the regime must be “self-enforcing” in the sense noted earlier. Cooperation has to be sustainable through mutual threats to punish defection with some sort of reciprocal defection—you cheat, I cheat. At least three considerations are pertinent in this regard.

We begin with two identified by the Folk Theorem and noted earlier. Cooperating states must not weigh the benefits of short-term cheating too heavily in relation to the costs of future punishments. This is plausibly the case in many international settings, though certainly not all.²⁹ In addition, the time horizon for cooperation must have no fixed endpoint, lest cooperation unravel as described earlier. This is commonly the case in international relations, which is helpful.

Moving beyond the considerations of the Folk Theorem, let us add a third consideration that formal theoretical models tend to leave out but that is quite important in practice. It is extremely important that parties to a self-enforcing arrangement be able to identify and distinguish behavior that represents cooperation from behavior that represents cheating or defection. Certain kinds of non-compliant behavior under the law are easy to define and detect, such as detonating a nuclear weapon. Other kinds of non-compliant behavior may be quite difficult to define or detect. Imagine an effort to establish rules requiring “humane” treatment of prisoners, for example. The concept of “humane” treatment is somewhat vague and subject to interpretation, and what happens to prisoners hidden behind prison walls may be difficult to discover. The general point is that cooperation will be easier and more likely to succeed if the parameters of cooperation can be specified precisely and deviation from them can be established readily. Otherwise, parties will fight over what constitutes cheating and cooperation can fall apart; likewise, parties will suspect surreptitious cheating and the same result may follow.³⁰

29. For example, in situations of conflict where the survival of a regime is at stake, the pertinent actors may have quite a short time horizon.

30. Additional and related considerations arise when cooperation is subject to shocks that may create temptations for defection or render a bargain inefficient. To avoid a complete breakdown of cooperation and to facilitate efficient responses to changing circumstances, it may make sense to “legalize” certain types of defections through “escape clauses” and similar mechanisms. See Kyle Bagwell & Robert W. Staiger, *A Theory of Managed Trade*, 80

These considerations complete the algorithm for thinking about a wide range of subject areas when asking whether international cooperation, orchestrated by international law, is feasible and sustainable. To summarize, we first ask what are the gains from cooperation, which usually involves the identification of an international externality problem, likely attributable to the fact that governments do not care much about the well-being of foreigners absent cooperation. Next we ask whether the gains from cooperation can be divided in a reasonably straightforward way so that all states benefit from cooperation. Finally, we ask whether the system can be made self-enforcing, a question that in turn requires attention to three sub-considerations: Are governments patient enough to forego the gains from short-term cheating? Is there no fixed endpoint to the cooperative enterprise? Is it reasonably easy to define what counts as cooperation, and to detect what counts as defection?

IV. INTERNATIONAL TRADE LAW

With this analytic structure in place, let us return to the example of the WTO/GATT system and apply the algorithm to it. It will help us to understand why GATT has been so successful and durable, and why I was wrong in the past to suppose that international law could not induce states to behave in ways that they would not otherwise due to the lack of a strong central enforcer.

We begin with the gains from cooperation on international trade, and the underlying externality problem. Imagine for a moment that a national government is deciding unilaterally on its tariff policy. The government confronts domestic political interests for and against higher tariffs. Import-com-

AM. ECON. REV. 779, 794 (1990) (finding that shocks in international trade tend to increase the incentive to deviate from free trade and increase protectionism, and tentatively explaining GATT safeguards, such as escape clauses, as accommodations for this economic reality); Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Economic Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 274–75 (1991) (characterizing GATT Article XIX as an escape clause for democracies, allowing them to respond to shocks in the political landscape); B. Peter Rosendorff & Helen Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829, 831 (2001) (arguing that when leaders face uncertainty about future domestic conditions, escape clauses provide the flexibility needed to participate in international agreements).

peting industries lobby for higher tariffs to protect them from foreign competition. Import-consuming industries, and perhaps individual consumers if they are able to organize politically, will lobby against higher tariffs that raise the prices of things that they buy. The government itself may place some value on tariff revenue. When all of these considerations are taken into account, the result will be some politically appropriate tariff policy from the national government's perspective.

Is there an obvious "externality" in this process? The answer is yes. The harm that foreign exporters may face from higher tariffs—which can depress the demand for their exports and force them to lower their prices in many cases to remain competitive—is unlikely to be taken into consideration by a government setting its tariff policy unilaterally. In other words, in setting its tariff policy on its own, country A is unlikely to consider the interests of a foreign exporter in country B trying to sell its products in country A.³¹ The economic theory of international trade agreements thus suggests that the harm done to foreign exporters by higher tariffs (or other protectionist measures such as quotas or protectionist regulations) constitutes an important international externality that

31. Formal models often posit that governments deliberately manipulate their "terms of trade" to achieve an advantage at the expense of trading partners. See Harry G. Johnson, *Optimum Tariffs and Retaliation*, 21 REV. ECON. STUD. 142, 153 (1953) (showing that "a country may gain by imposing an optimum tariff even if other countries retaliate by following the same policy"); Kyle Bagwell & Robert W. Staiger, *An Economic Theory of GATT*, 89 AM. ECON. REV. 215, 241 (1999) (showing that states can use their unilateral tariff choices to alter world prices and shift the cost onto trading partners). This notion has been a subject of critique on the grounds that governments do not in fact take account of the terms of trade effects of their policies, or even understand the concept. See Donald H. Regan, *What Are Trade Agreements For?—Two Conflicting Stories Told by Economists, with a Lesson for Lawyers*, 9 J. INT'L ECON. L. 951, 977–78 (2006) (arguing that countries are likely more motivated by protectionist or revenue considerations than terms of trade considerations). But the terms of trade models can also be interpreted as suggested in the text—that governments ignore the harm done to foreigners by their policies (which of course flows through a deterioration in foreigners' terms of trade). See Robert W. Staiger & Alan O. Sykes, *International Trade, National Treatment, and Domestic Regulation*, 40 J. LEGAL STUD. 149, 187 (2011) (positing that states ignore the impact of their decisions on foreign surplus when formulating policies unilaterally). So reinterpreted, the terms of trade models do capture, in my view, the essential externality associated with non-cooperative trade policies.

arises when states set their trade policies without cooperation. Because the externality here is a negative one—that is, foreign exporters are harmed by protectionist policies—theory suggests that trade policy will be excessively protectionist absent international cooperation. Accordingly, when nations cooperate over trade policies, the result can be predicted to be a reduction in protectionism (lower tariffs, fewer quotas, and so on).

That is precisely what we observe over the history of the WTO/GATT system. When nations assemble to negotiate over trade policy, the dynamic is one of reciprocal trade concessions: I'll lower my tariff on your exports to me, if you will lower your tariff on my exports to you. Trade agreements serve to memorialize these reciprocal promises, and thus aid in identifying what counts as cooperation or defection. The externality problem is addressed effectively in this fashion because exporters, who are omitted from the political calculus in their target markets absent international cooperation, can now participate in lobbying their governments to secure market access concessions from trading partners.

The second part of the algorithm asks whether the gains from cooperation can readily be divided to induce participation by all states involved in negotiation. The answer here is yes, in part because the externality problem is in large measure reciprocal. All of the major trading nations have significant export sectors in their economies and impose negative externalities on each other when they engage in protectionist policies unilaterally. By scaling back those policies through mutual agreement, all of them can benefit.

The third question to ask is whether trade agreements can be made self-enforcing. The long-term contract embodied in a trade agreement is in an important way much like our earlier example of a long-term agreement requiring one party to deliver goods and the other party to pay for them. Each party presumably benefits from its participation in the arrangement, but each party would also prefer to receive the other party's performance and not have to perform itself. In particular, each party would be delighted if its exporters could benefit from the reduction of protectionist barriers abroad without having to reduce its own trade barriers below the level that it would choose based on purely domestic considerations, that is,

the level that it would choose in the absence of international cooperation.

As we noted earlier, however, the WTO/GATT system lacks anything analogous to a central enforcer with the power to coerce members to respect their commitments.³² Fortunately, however, the conditions for successful self-enforcement are met.³³ First, there are many future periods of cooperation, the loss of which can impose a heavy economic cost on members that cheat seriously on their commitments. The gains from short-term cheating will tend to be small by comparison.

Second, cooperation on trade matters is open-ended. There is no temporal endpoint to cooperation that could create an unraveling problem.

Third, with respect to many issues, cooperation is easy to define and articulate. If a GATT member promises not to charge more than a 10% tariff on widgets, for example, that can be memorialized and any exporter that finds itself subject to a higher tariff will know more or less immediately. Cheating on such commitments is thus quite easy to detect.³⁴

The WTO/GATT system also uses arbitral panels to investigate allegations of cheating. Even though such panels have no power to force compliance with their rulings, they do reveal information that allows members to determine whether or not cheating has occurred, and thus to mete out appropriate punishment if it has.³⁵

Of necessity, I have left out an enormous amount of detail, but enough has been said to offer a sense of why interna-

32. See *supra* notes 9–14 and accompanying text.

33. See, e.g., KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* 96 (2002) (explaining that when countries trade repeatedly over time, the prospect of retaliation makes trade agreements self-enforcing).

34. Other issues are more subtle, and cheating may be harder to define and detect. The growth of the elaborate technical barriers agreements in the WTO pertaining to domestic regulatory policy, and the frequent disputes over the legality of alleged technical barriers, highlight the problem. See generally Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1999) (describing disputes that arise over the use of regulatory measures as protectionist devices and criticizing such practices as wasteful relative to traditional protectionist instruments).

35. See JACKSON, DAVEY & SYKES, *supra* note 8, at 272–77 (concerning dispute resolution and retaliation).

tional trade law has been immensely successful and durable despite the lack of centralized, coercive enforcement.

V. OTHER AREAS OF INTERNATIONAL LAW

Let us now consider some other bodies of international law through the same lens. The treatment of these areas will be brief.

A. *The Laws of War*

On security matters, one example of fairly successful cooperation through the years has been the Geneva Protocol banning the use of chemical and biological weapons in wartime, and associated “soft law” norms against the use of chemical weapons. Such weapons were used extensively and horrifically in World War I,³⁶ which led to the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare in 1925.³⁷ Belligerent nations subsequently refrained from any substantial use of chemical weapons in World War II. The conditions for successful cooperation were again met. The externality lies in the long-term, unnecessary harm to enemy soldiers and civilians caused by chemical weapons—effective military tactics that succeed in battle but that avoid these harms are available to both sides. Because all of the parties to World War II could readily produce chemical weapons, the externality was reciprocal and all parties could benefit from the ban.³⁸ The use of chemical weapons by the other side could be easily detected and punished in kind. The only potential problem with cooperation related to end-game scenarios, where toward the end of the War, one party might have been tempted to use chemical weapons out of desperation to stave off defeat. Fortunately, that was not a viable strategy for the Germans and Japanese, and the norm against such weapons more or less held up throughout the War.

36. See *Weapons of War—Poison Gas*, FIRSTWORLDWAR.COM, <http://www.firstworldwar.com/weaponry/gas.htm> (last visited Apr. 14, 2013) (describing the use of various chemical weapons during World War I).

37. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571.

38. POSNER & SYKES, *supra* note 1, at 192–93.

Of course, the conditions for successful cooperation during World War II need not arise in all other wars. Iraq used chemical weapons in its war against Iran in the 1980s, perhaps because the situation was not reciprocal and Iran was not in a position to respond quickly.

A somewhat similar story can be told about the Geneva Conventions requiring, among other things, humane treatment of prisoners of war. The externality is obvious—the army that holds the prisoners bears the cost of caring for them, but the benefits go to the captured enemy soldiers. It is reciprocal to the degree that both sides have significant numbers of prisoners. If both sides can observe the treatment of prisoners by the others, self-enforcement is possible via mutual threats to respond in kind to any mistreatment. One difficulty here is that it can be difficult to know how the other side is treating your prisoners; perhaps Red Cross observers can help at times, but if your soldiers are held in the jungles of Asia, as in World War II, it may be hard to obtain current information on their treatment. Likewise, some parties to conflict may feel morally prohibited from retaliating in kind for inhumane treatment of prisoners, and if enemies know this fact, their own incentive to treat prisoners humanely may weaken. For these and related reasons, the rules about treatment of prisoners are obeyed sometimes but not always.³⁹

B. *Immigration*

Let us now turn to two areas where sustainable cooperation is difficult or impossible for reasons that our algorithm identifies, starting with an area where there is rather little international law: immigration. Are there important gains from international cooperation on migration? Absolutely. When nations set their immigration policies unilaterally, they focus on their own well-being and tend to ignore the potential effects on foreigners, including potential migrants themselves, who could often benefit greatly from relaxed restrictions. Immigration limitations will then tend to be too restrictive from a global standpoint. As Harvard economist Dani Rodrik put it recently:

39. See POSNER & SYKES, *supra* note 1, at 193 (providing examples of reasons why a state would decide not to practice the humane treatment of prisoners of war).

So the gains from liberalizing labour movements across countries are enormous, and much larger than the likely benefits from further liberalization in the traditional areas of goods and capital. If international policy makers were really interested in maximizing worldwide efficiency, they would spend little of their energies on a new trade round or on the international financial architecture. They would all be busy at work liberalizing immigration restrictions.⁴⁰

Yet, we see few efforts and little progress on this front. Why? There are two key difficulties. First, the benefits of relaxed immigration restrictions are not symmetrical. Take the United States and Mexico, for example. Historically at least, far more Mexicans have migrated to the United States than have moved in the reverse direction.⁴¹ It is hard to see how a reciprocal agreement to liberalize migration restrictions would be of much interest to the United States.

To be sure, as we noted earlier, issue linkage might be a solution. Perhaps the United States could be induced to liberalize if Mexico offered concessions in a different policy sphere. But here lies the second key difficulty. Does Mexico benefit from securing opportunities for its citizens to migrate permanently to the United States? The answer may be no for two reasons.

The first reason turns on a result in standard microeconomic models of industries that exhibit “constant returns to scale” (a doubling of all inputs doubles output). In such settings, theory suggests that with competitive markets, inputs into production—often termed “capital” and “labor” in

40. Dani Rodrik, *Final Remarks*, in IMMIGRATION POLICY AND THE WELFARE SYSTEM 314, 314 (Tito Boeri, Gordon Hanson & Barry McCormick eds., 2002).

41. Data on migration to Mexico can be found in Instituto Nacional de Estadística, Geografía e Informática [INEGI] [National Institute of Statistics, Geography and Information], *Los Extranjeros en México* [Foreigners in Mexico] (2000), http://www.inegi.gob.mx/prod_serv/contenidos/espanol/bvinegi/productos/estudios/sociodemografico/ext_en_mex/extraen_mex.pdf. For a discussion of the history of net migration to the United States by Mexican nationals, see Jeffrey Passel, D’Vera Cohn & Ana Gonzalez-Barrera, *Net Migration from Mexico Falls to Zero—and Perhaps Less*, PEW RESEARCH CENTER (May 3, 2012), available at <http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/>.

simple models—will each be paid the value of their marginal product (that is, the value of their incremental contribution to the value of total output). Likewise, holding constant the amount of other inputs, these models suggest that each input product has a diminishing marginal product. For example, with the capital stock fixed, additional units of labor produce diminishing amounts of additional output.

Against this backdrop, suppose that one country has abundant labor and the other has abundant capital, which crudely describes Mexico and the United States, respectively. Labor in the labor abundant country sees higher returns in the capital-abundant country and wishes to migrate. The migrants gain from migration, of course, or they would not move. The receiving country also gains from immigration in this economic framework, because the marginal product of labor falls with immigration—each migrant is paid the marginal product of labor but the average product of migrants is higher (the marginal product is falling), the difference going to people previously resident in the receiving country (specifically, the owners of capital). In other words, migrants collectively produce more than they are paid. The labor abundant country suffers an economic loss, however, for the opposite reason—the departed laborers had been paid their marginal product, which was below their average product, and the surplus previously going to owners of capital in the labor abundant country evaporates. Put differently, outmigration is injurious to those left behind.⁴²

A second and related phenomenon associated with the costs of outmigration is often discussed under the rubric of the “brain drain.” Developing countries often complain that many of their most skilled and talented citizens emigrate to developed countries where incomes are higher. The loss of skilled labor, which is complementary in production to unskilled labor and capital left behind, reduces the returns to those who stay behind whose skills become less valuable.⁴³

42. See generally Alan O. Sykes, *International Cooperation on Migration: Theory and Practice*, 80 U. CHI. L. REV. 315, 316 (2013) (examining facets of immigration policy through the lens of economic theory).

43. See, e.g., Jagdish Bhagwati & Carlos Rodriguez, *Welfare-Theoretical Analyses of the Brain Drain*, 2 J. DEV. ECON. 195, 195 (1975) (reviewing different theoretical analyses of the effects that the brain drain has on welfare).

For these reasons, countries with abundant labor that would like to migrate may have little interest in securing opportunities for permanent outmigration of its citizens. It all depends on how the government values the well-being of the migrants who would leave on the one hand, versus the well-being of those left behind.

The government's calculus may change if migration is temporary. When immigrants remain citizens of their home country, send remittances back to their families, and eventually return home to vote, their well-being may be more politically salient and their home country may be more likely to view temporary outmigration as a benefit. Interestingly, most of the international cooperation on migration (outside of the European Union) is indeed related to the temporary movement of skilled or unskilled workers.⁴⁴ The WTO General Agreement on Trade in Services (GATS), for example, includes commitments for the temporary movement of managers and other skilled workers across a range of service sectors.⁴⁵ Countries such as the United States and Canada have long had arrangements for temporary migration of less-skilled workers with countries such as the Philippines and Jamaica.⁴⁶

C. *Human Rights*

Let us now spend a few moments on international human rights law. As a caveat, I want to be clear that I am talking about the broader multilateral human rights treaties, and not about, for example, the human rights law in the European Union, which has been quite influential and effective.⁴⁷

There are quite a number of human rights treaties around, many of which have been signed by a large number of countries, including some that are known for paying little attention to human rights. Iraq and Iran both signed the ICCPR

44. See Sykes, *supra* note 42, at 334–37 (providing examples of international cooperation directed at the temporary migration of certain categories of workers).

45. *Id.* at 335.

46. *Id.* at 334.

47. See PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 891 (2013) (highlighting reasons why the European Court of Human Rights has been effective in developing international human rights law, particularly in terms of establishing a complaints procedure and generating jurisprudence).

in the 1960s, for example.⁴⁸ Many observers question whether human rights treaties have much impact on the behavior of signatories.⁴⁹ A well-known study by Oona Hathaway at Yale concluded that they do not.⁵⁰ Others have criticized that study.⁵¹ It is probably fair to say that the empirics are not altogether settled regarding the effects of human rights treaties on the behavior of governments, but what one can say with confidence is that the requirements of human rights treaties are ignored with considerable regularity by various regimes.

Why are many multilateral human rights treaties comparatively ineffective relative to, say, trade treaties? Let's think it through. The international externality associated with human rights violations is best understood as a species of altruism.⁵² People in liberal states, and perhaps powerless people in repressive states, feel badly about the mistreatment of others abroad—religious and ethnic minorities, women, political prisoners, and so on. They would like to improve the conditions facing repressed people, and they see human rights treaties as an opportunity to do so.

This externality is seemingly non-reciprocal, at least if we focus on the leaders of states. One doubts that figures such as Saddam Hussein and Charles Taylor worry much about human rights conditions abroad. While liberal regimes would

48. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

49. See POSNER & SYKES, FOUNDATIONS, *supra* note 1, at 206–08 (discussing challenges to the international human rights regime, including conflicting cultural values and the right of developing countries to do what is necessary to stimulate economic growth and relieve poverty).

50. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1989 (2002). See also Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588, 613 (2007) (examining why states decide to commit to human rights treaties and concluding that domestic legal enforcement and collateral consequences influence said decisions).

51. See Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 172 (2003) (criticizing Hathaway's research methodologies, theoretical explanations, and policy recommendations).

52. See POSNER & SYKES, FOUNDATIONS, *supra* note 1, at 202–06 (describing altruistic motives that states might possess for having a foreign policy designed to encourage or pressure repressive states into compliance with human rights treaty obligations).

benefit if despots would refrain from human rights abuses, the despots themselves see human rights obligations as a cost of doing business with little benefit in return. If they accede to a human rights treaty nevertheless, it is likely because they gain some modest amount of local or international stature by doing so, even if they have little intention of honoring it.

How can they get away with ignoring the terms of the treaty? The answer is that these treaties are simply not self-enforcing. If some despot violates the treaty by treating a minority group badly, for example, liberal regimes are not going to retaliate by treating their own minority groups badly. That would be illogical and would not work anyway. The treaties themselves generally omit formal issue linkage, whereby a human rights violator may be punished in some other policy sphere. The only international enforcement mechanism is international condemnation, coupled with unilateral sanctions or efforts to mobilize sanctions in the Security Council. Unilateral sanctions are often insufficient, and Security Council sanctions often do not materialize because the veto players in the Council cannot agree on them.⁵³ They may well be ineffective in any case.

Moreover, whatever pressures can be brought to bear on human rights violators are in large measure independent of their formal international legal obligations. The international reaction to a genocide is not going to turn heavily on whether the perpetrators of genocide have signed some treaty prohibiting it, for example. For all of these reasons, international human rights law *per se* is quite limited in its impact.

It is not my intention here to run down international human rights law or to dismiss its significance. It is aimed at exceedingly important issues and it likely has some positive influence on behavior in some cases. It may also serve what scholars sometimes call an “expressive” function.⁵⁴ By declaring the sense of the international community that certain practices are abhorrent, perhaps the preferences and mores of

53. *See id.* at 90 (attributing the ineffectiveness of the Security Council to its weak structure, wherein action requires a supermajority of member states to overcome divergent interests and reach an agreement).

54. *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996) (describing the use of the expressive aspects of law to change norms).

human rights violators will shift somewhat toward the international consensus. My only point is that human rights treaties are less effective over time than certain other bodies of international law because the pertinent externalities are often non-reciprocal and self-enforcement is difficult.

Various strategies might be deployed to try and make human rights treaties more effective. The most obvious is issue linkage: abusive regimes might be induced to respect human rights better if they were offered concessions on other matters of interest to them. Such an approach, using “carrots” to induce compliance, is roughly the obverse of a strategy that we often see in practice, which deploys “sticks” (sanctions) to try and encourage better human rights behavior. Among the difficulties with using “carrots” in this context, however, beyond the obvious political challenges, is that abusive regimes might be tempted to abuse human rights to an even greater extent to extract more “carrots.” Perhaps that explains why we do not see such an approach in practice to any great extent.

VI. DOMESTIC COMMITMENT THEORIES OF INTERNATIONAL LAW

Thus far, all of the examples I have discussed fit well with the premise that the potential gains from international cooperation, and international law, arise from the presence of international externalities. This is the most common explanation for international law in my view, but there is another possibility that warrants mention.

Economists and political scientists have suggested that in some instances, international law is not about addressing international externalities, but about making credible commitments to certain domestic constituencies.⁵⁵ Andrew Moravcsik at Princeton has posited, for example, that the accession of former Soviet satellite states to European human rights treaties was motivated by the desire of governments in these emerging democracies to lock in democratic reforms as much as possible

55. It has been suggested, for example, that international trade treaties are at times driven by a desire to make credible future commitments to domestic constituencies. *See, e.g.,* Giovanni Maggi & Andrés Rodríguez-Clare, *A Political-Economy Theory of Trade Agreements*, 97 *AM. ECON. REV.* 1374, 1374–78 (2007) (using domestic-commitment problem to “develop a political-economy theory of trade agreements”).

against the possibility that a future autocratic regime might wish to undo them.⁵⁶ International trade economists have also posited that trade agreements may in part be explained by a desire on the part of governments to disable themselves from capitulating to domestic political pressures for protectionism in certain scenarios.⁵⁷ In these theories, the value of international law lies not in the gains that it confers directly on other states, but in strengthening the hand of a domestic government against some domestic constituency or against a future domestic government.

A. *International Investment Law*

Another example that *in part* fits into the domestic commitments framework is the typical bilateral investment treaty, or “BIT,” of which there are now nearly two thousand.⁵⁸ Many signatories of these treaties are small developing countries, and it is difficult to imagine that investors in countries like the United States, China, Japan, and Europe care a great deal *ex ante* about access to investment opportunities in many of these tiny markets. The impetus for treaties with these small states likely lies in substantial measure with the developing countries themselves, as well as with investors who have already made or will soon make investments in them. Many of these countries have limited capital, and seek to attract foreign investment. Investors, of course, pay close attention to the risks that they face, and charge a risk premium—that is, they require a higher rate of return—for investments that are riskier, other things being equal. Developing countries frequently have a limited track record as to their treatment of foreign investors,

56. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 220 (2000) (describing the use of human rights norms as a tool to “lock in” democratic rule, adding that newly established democracies have also used self-binding human rights treaties to protect against nondemocratic threats).

57. See, e.g., Giovanni Maggi & Andrés Rodríguez-Clare, *The Value of Trade Agreements in the Presence of Political Pressures*, 106 J. POL. ECON. 574, 577–78 (1998) (reasoning that a government with a strong bargaining position relative to domestic lobbies is less likely to join a free-trade agreement whereas countries in which lobbies have greater bargaining power are more likely to join free-trade organizations).

58. See UNCTAD, INVESTMENT INSTRUMENTS ONLINE: WHAT ARE BITS? (Aug. 17, 2004) http://www.unctadxi.org/templates/Page___1006.aspx (compiling and providing access to over 1,800 BITS).

and some may have treated them poorly in the past.⁵⁹ The investment risks in these developing countries include the danger of expropriation without fair compensation, the danger that foreign investors will become the target of discriminatory taxation or regulation, and so on. Once an investment is made and capital assets are fixed in the host country, they can be quite vulnerable to these risks.⁶⁰

Consequently, developing countries may find that the cost of borrowing from abroad—or the returns necessary to attract direct investment—are quite high. They would like to lower these costs, and can do so by reducing the riskiness of investment. The best way to do so is to make a credible commitment to foreign investors that they will not be victimized by expropriation, discrimination, or other worrisome practices. Bilateral investment treaties do so in three ways.⁶¹

First, they create binding international obligations prohibiting, for example, discrimination against foreign investors and expropriation without fair compensation. Second—and this is quite unusual under international law—BITs usually give foreign investors private rights of action to enforce their rights.⁶² If instead BITs operated more like other forms of international law, which give standing to seek redress only to governments, investors would have to worry that their governments might not easily be moved to seek redress on their behalf, and investment risk would be considerably greater.⁶³

59. On the history of international investment law and the evolving practices of developing countries in this area, see JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* (2010) (describing past incidents of expropriation, nationalization, and dispossession and how these acts have influenced the development of modern investment treaties).

60. POSNER & SYKES, *FOUNDATIONS*, *supra* note 1, at 288 (adding that such risks result in diminishing investment value).

61. Economically oriented writing on the theory of BITs is scant. A brief treatment may be found in POSNER & SYKES, *FOUNDATIONS supra* note 1, at 288–97.

62. On the difference between trade and investment treaties regarding private rights of action, see Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 *J. LEGAL STUD.* 631, 662 (2005) (concluding that private rights of action are valuable in the context of investment treaties but less suitable in the context of trade treaties).

63. *See id.* at 643–44 (providing reasons why an investor may be ineffective at influencing its government to retaliate against a state that violates investment agreements).

But these two steps are not enough. Even if the host country makes legal commitments to investors, and provides private rights of action to enforce them, investors may still worry that they will be treated unfairly in the courts of the host country. Accordingly, investment treaties not only afford private rights of action but allow those actions to be brought in reliable and neutral forums. The most popular forum is the International Center for the Settlement of Investment Disputes (ICSID), an arm of the World Bank.

Although BITs to a degree are driven by a desire to make credible domestic commitments to existing investors in the host state, they can also be understood with the aid of the externality framework emphasized above with respect to other areas of international law. Even if large investor countries do not care a lot about access to small investment markets *ex ante*, their nationals do worry about being taken advantage of *ex post*, after they have made investments that entail sunk costs. And they may fear exploitation precisely because they are foreigners, less likely to be able to protect themselves in the host country's political system. Further, to the degree that BITs involve *large* markets for potential investments—negotiations are presently underway between the United States and China regarding a possible BIT, for example⁶⁴—important *ex ante* externalities may be present. Restrictions on foreign investment in China might well affect the perceived returns to U.S. investors in global markets.

In short, what differentiates investment treaties from trade agreements is that they may be motivated less by a desire to make commitments to other governments because of a troublesome international externality *ex ante*, and instead by a desire to make commitments toward foreign investors who put their capital at risk in the host country and are worried about their prospects *ex post*. Investment treaties reduce the risks to these investors and lower the costs of imported capital for the host country.

64. See Karl P. Sauvant & Huiping Chen, *A China–US bilateral investment treaty: A template for a multilateral framework of investment?*, 85 COLUM. FDI PERSP. (Dec. 17, 2012), <http://www.vcc.columbia.edu/content/china-us-bilateral-investment-treaty-template-multilateral-framework-investment> (suggesting that both countries have an interest in increasing protection for investors by putting their bilateral investment relationship on predictable footing).

Putting the point slightly differently, the effects of investment treaties are not reciprocal. When the United States, say, signs a BIT with Bolivia, U.S. investors likely gain more than Bolivian investors, for two reasons. First, investment from Bolivia into the United States may be minimal—the flow may be heavily from the United States toward Bolivia. Second, Bolivians who do invest in the United States are already protected pretty well against expropriation, discrimination, and the like by U.S. law and U.S. courts. The fact that U.S. investors gain more does not make the treaty unfair or unbalanced, however, because the gains to Bolivia flow not to those engaged in foreign investment but to the variety of domestic interests that benefit from the presence of cheaper foreign capital.

CONCLUSION

My goal in this brief contribution has been to show how simple economic thinking can help us to understand how international law will be more or less effective in practice, and to elucidate the two major competing economic theories of what international law is all about—international externality problems and domestic commitment problems. By applying these insights to different fields of international law, including many that I have omitted in the interest of brevity, we can learn a great deal about what international law can and cannot reasonably accomplish. The key lessons are that international law works best when the gains from cooperation are substantial, when they are reciprocal for the states that participate in the legal regime, and when the regime can be structured to make it self-enforcing. Where these conditions are met, we see successful examples of international legal cooperation. Where they are not, efforts at cooperation through international law typically fall short.